IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9543 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHOBHANABEN S RATHOD

Versus

THE PRESIDENT

Appearance:

1. Special Civil Application No. 9543 of 2002

MR YN RAVANI for Petitioner No. 1

MR YM THAKKAR for Respondent No. 1

MS SONAL VYAS, AGP for Respondent No. 2-4

MR DHIRENDRA MEHTA for Respondent No. 5

MR PS CHAMPANERI for Respondent No. 5

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 28/10/2002

ORAL JUDGEMENT

#. The petitioner was a councillor of Savarkundla Municipality. By the impugned order, she is removed as councillor on the ground that, she has incurred disqualification for being continued as councillor, and, accordingly, the proceedings under Section 38 of the Gujarat Municipalities Act, 1963 were initiated. The Collector passed the order under Section 38 of the said Act, which was confirmed by the Director of Municipalities in appeal. The said order of the Director of Municipalities is impugned in the present petition.

#. The petitioner was elected as councillor on 20.1.2000. The son of the petitioner, viz., Vipul Rathod was serving in Savarkundla Municipality as Class-IV employee as Sweeper. It is not in dispute that, at the time when the petitioner was elected as councillor, her son was already in employment of Savarkundla Municipality on the aforesaid post. The show cause notice dated 20.4.2002 was issued to the petitioner under Section 38 of the Act on the ground that the petitioner has favoured her son for the purpose of getting promotion from Sweeper to Surveyor and, accordingly, she has incurred disqualification under the provisions of the Act. The petitioner gave reply to the said show cause notice denying the charges levelled against her. The Collector, Amreli, thereafter, by his order dated 8.7.2002 came to the conclusion that the petitioner has incurred disqualification for being continued as councillor under section 38 of the Act. The Collector came to the conclusion that the son of the petitioner got promotion as Surveyor and was also given the benefit of three increments. The Collector also came to the conclusion that the petitioner helped the earlier President Smt.Muktaben K.Virani at the time when the said President was facing No Confidence Motion and by that, she has got the benefit of procuring the order in favour of her son. The said promotion order was cancelled by the Chief Officer on 8.12.2000 and at the subsequent stage also, the petitioner helped the said President - Ms.Virani by not remaining present again at the time of discussion of No Confidence Motion, and, again the said President obliged the petitioner by giving promotion order in favour of the son of the petitioner. The Collector, accordingly, found that the petitioner has directly or indirectly played the role for getting the benefit of promotion in favour of her son. The said order of the Collector dated 8.7.2002 was challenged by the petitioner by filing the appeal. The said appeal was disposed of by the Director of Municipalities, who by his order dated 12.8.2002 dismissed the said appeal and confirmed the

order passed by the Collector. Being dissatisfied by the aforesaid order of the Director of Municipalities, the petitioner has approached this Court by way of this petition.

#. At the time of hearing of this petition, it is argued by Mr.Ravani, learned advocate, for the petitioner that the petitioner was elected as councillor on 20.1.2000, while her son was already in employment since 1998. It is submitted that, the son of the petitioner is residing separately since long and at the time when so-called promotion order was issued in favour of her son by the then President, he was already residing separately. The petitioner has also produced the copy of the ration card to substantiate her say that her son was residing separately at the relevant time, which is at Annexure-C/1 and C/2. It is submitted that, the petitioner has not played any role, in any manner, in the matter of promotion order, which was passed by the President. It is also submitted that, initially, the Chief Officer also recommended such promotion and the signatory to the said promotion order is the then President and absence of the petitioner at the time of passing of No Confidence Motion against the President can never be said to be a valid ground for coming to the conclusion that the petitioner has played any role in the matter of promotion of her son. It is submitted that the petitioner is not concerned, whether her son is entitled to the promotion or not. It is further submitted that the petitioner has not played any role worth the name and that this is not the way by which the elected representative can be removed in such a casual manner. It is also submitted that the petitioner has not incurred any disqualification as contemplated by Section 38 of the Act, and, the order in question is required to be set aside.

#. On behalf of the State Government, Ms.Vyas, learned Assistant Government Pleader, has frankly submitted that the Director of Municipalities has not considered the judgment of the Apex Court as well as judgements of this Court in his order.

#. On behalf of the Chief Officer, Mr.Champaneri, learned advocate, has tried to support the order of the Collector as well as the order of the Director of Municipalities.

#. I have heard the learned advocates in detail and also considered the record of the case.

#. It is required to be noted that the Director of

Municipalities, while dealing with the appeal, has not taken into consideration the judgment of the Apex Court reported in 1989 (2) GLR 969 as well as the judgments of this Court reported in 1977 GLR 370 and 1996(3) GLR 477. Since the judgment of the Apex Court as well as the judgments of this Court were dealt with in a very casual manner, the Secretary, who decided the said appeal, was summoned by this Court and accordingly, he appeared before this Court on 22.10.2002. On his behalf, Mr.Trivedi, learned Additional Advocate General, frankly submitted that the judgment of the Apex Court as well as the judgments of this Court have not been taken into consideration by the said officer. Even the concerned officer also accepted the said aspect and submitted unconditional apology for dealing with the judgment of the Apex Court as well as of this Court in a routine and casual manner, and has assured the Court that he will take appropriate care in future while deciding the cases and will give due consideration to the judgments, which might be cited before him. When the authority is exercising the quasi judicial powers, it is expected from such authority that the judgements delivered by the Apex Court as well as by this Court, which are binding to the authority, are required to be considered appropriately instead of dealing with such judgments in a casual routine fashion, which has been done in the instant case by the Director of Municipalities. It is the duty of the officer to discuss the ratio of such judgements and to find out, whether the same are applicable to the facts of the case. It is not proper not to refer to the judgments of the higher Courts or to refer the same in a routine and casual manner. It is hoped that the concerned Secretary or Officer of the Government, who decides such quasi judicial proceedings, will take appropriate care in future in this regard. In the instant case, since the concerned Secretary has already tendered his apology and assured the Court that, he will be more careful in future, nothing further is required to be done in this connection.

#. So far as the merits of the present petition is concerned, it is not in dispute that the son of the petitioner was already serving as Sweeper before the petitioner got herself elected as councillor of the Municipality. It is also not in dispute that the Chief Officer has recommended the promotion of her son. Whether the son of the petitioner was qualified to be promoted is a different issue altogether to which I am not concerned in the present petition. It is also an admitted fact that, the order was issued by the then President of the Municipality. From the record of the

case, there is nothing to suggest that the petitioner has recommended even orally or by way of any writing the case of her son to the President or to the Chief Officer of the Municipality. There is absolutely no evidence worth the name for coming to the conclusion that the petitioner has played any role in securing the promotion order in favour of her son in any manner. The appellate authority came to the conclusion that the promotion order was passed in favour of the son of the petitioner contrary to the Rules and Regulations and no procedure was ever followed in giving the promotion to her son from Class-IV to Class-III, and, therefore, subsequently, the said promotion order was cancelled by the Chief Officer. The appellate authority came to the conclusion that, by not remaining present in the meeting wherein the issue of No Confidence Motion was to be discussed, the petitioner has indirectly helped the said President, and, in turn, the President has obliged her by promoting her son on the post of Surveyor. However, as observed earlier, there is neither direct nor any indirect evidence which is available for reaching to the said conclusion to the effect that the petitioner has played any role in the matter of getting the benefit of promotion in favour of her son. In my view, elected representative cannot be removed in such a casual fashion by resorting to the circumstantial evidence. There is nothing on record to show that the petitioner has influenced any councillor or the President in the matter of promotion of her son nor she has written any recommendatory letter to any one in this behalf. In view of the same, it is clear that, without there being any rational or cogent ground, in a very perfunctory manner, the proceedings have been initiated against the petitioner and, accordingly, she is removed as councillor of the Municipality. This is a clear case of misuse of powers by the authority. At this stage, reference is required to be made to the judgment of the Apex Court in the case of Tarlochan Dev Sharma Vs. State of Punjab and others, reported in AIR 2001 SC 2524. It has been observed by the Apex Court in para 6 as under.:

> "6. In a democracy governed by rule of law, once elected to an office in a democratic institution, the incumbent is entitled to hold the office for the term for which he has been elected unless his election is set aside by a prescribed procedure known to law. That a returned candidate must hold and enjoy the office and discharge the duties related therewith during the term specified by the relevant enactment is a valuable

statutory right not only of the returned candidate but also of the constituency or the electoral college which he represents. Removal from such an office is a serious matter. It curtails the statutory term of the holder of the office. A stigma is cast on the holder of the office in view of certain allegations having been held proved rendering him unworthy of holding the office which he held. Therefore, a case of availability of a ground squarely falling within S.22 of the Act must be clearly made out. A President may be removed from office by the State Government within the meaning of S.22, on the ground of "abuse of his powers" (of President), interalia. This is the phrase with which we are concerned in the present case."

#. Considering the facts of the present case, in my view, the order passed by the Collector is absolutely unsustainable. It cannot be said that, with a particular motive, the petitioner has not remained present at the time when No Confidence Motion was to be discussed against the President. It is not necessary for this Court to examine, whether there was any justifiable ground available to the petitioner for not remaining present at the relevant time when No Confidence Motion was to be discussed. Suffice it to say that simply because the petitioner has not remained present during the meeting at the relevant day, one cannot jump to the conclusion that, in order to get some benefit from the President, the petitioner has abstained herself from voting at the relevant day.

#. Reference to Section 38 of the Act is required to be made at this stage. Section 38 of the Act reads as follows.:

"38. Disabilities from continuing as a councillor. (1) If any councillor during the term for which he has been elected or nominated.-

(a) becomes subject to any disqualification specified in section 11, or

(b) acts as a councillor in any matter -

(i) in which he has directly or indirectly, by himself or his partner, any such share or interest as is described in clause (i), (ii), (iii), (v) or (vii) of sub-section (3) of section 11, whatever may be the value of such share or

interest, or

(ii) in which he is professionally interested on behalf of a principal or other person, or

(c) is professionally interested or engaged in any case for or against the municipality, or

(d) departs beyond the limits of the State with the declared or known intention of absenting himself continuously for a period exceeding six months, he shall subject to the provisions of sub-section (2) be disabled from continuing to be a councillor and his office shall become vacant.

(2) In every case, the authority competent to decide whether a vacancy has arisen shall be the Collector. The Collector may give his decision either on an application made to him by any person or on his own motion after giving the councillor a reasonable opportunity of being heard.

(3) Until the Collector decides under sub-section (2) that the vacancy has arisen, the councillor shall not be disabled under sub-section (1) from continuing to be a councillor.

(4) Any person aggrieved by the decision of the Collector may, within a period of fifteen days from the date of such decision, appeal to the State Government and the orders passed by the State Government in such appeal shall be final."

On behalf of the petitioner, reference is made to the judgment of the Apex Court in Rustamji Nasarvanji Dangor Vs. Jeram Kunvarji Ganatra and ors., XVIII GLR 370. The Supreme Court in the aforesaid judgment, while examining the scope of Section 38 of the Act, has observed in paragraph 4 as under :

"4. The legality of the chief officer's order is not however an issue in this case, and the question whether or not the intended use of the plot by the appellant was beyond the scope of by-law 4 need not detain us. Accordingly to the High Court it was only because the appellant held the office of president of the municipality that the chief officer allowed his application. This

may or may not be true, but it is not a matter relevant to the real question that arises for consideration in this case. Sec.38(1)(b)(i) disables a councillor from continuing as such if he "acts as a councillor" in the matter of allotment of any land to himself, there is no bar in the Act to a councillor getting a lease of the land from the municipality, as would appear from sec. 11(3)(A)(i). It is only in a case where he acts as a councillor in getting the lease that he is disqualified. There is nothing in the record of this case to show that the appellant had acted as a councillor to have the plot allotted to himself. Even if the chief officer was influenced by the fact that the applicant before him was president of the municipality, that would not attract sec. 38(1)(b)(i). It is true that sec. 45 confers a general power of supervision and control on the president over the acts of all officers of the municipality and sec. 49, which enumerates the powers and duties of chief offices, also makes him subject to the general control of the president in the discharge of these powers. But the general power of supervision conferred on the president does not, in our opinion, imply that in every case where he applies for a lease, which he is entitled to do as sec. 11(3)(A)(i) indicates, he should be deemed to have "acted" within the meaning of sec. 38(1)(b); otherwise, the president of a municipality under this Act, by virtue of his office would be disentitled altogether from applying for permission to use any land of the municipality. If this were the correct position then there was no point in limiting the disqualification contemplated in sec. 38(1)(b)(i) to cases where the councillor acts as a councillor. The words "acts as a councillor" cannot be treated as redundant. In our view the councillor acts as a councillor within the meaning of sec. 38(1)(b) when he performs any of the functions which under the Act he is required to perform. An allegation of misuse of his position against a councillor would not attract the disability under sec. 38(1)(b)(i) unless it was shown further that he has acted as a councillor in the matter. In view of the clear provision of sec. 38(1)(b)(i) we do not find it possible to support the impugned judgment."

Reference is also required to be made to the judgment of

this Court in the case of Chandrikaben Kapilbhai Joshi Vs. Collector, Bhavnagar District and others, reported in 1996(3) GLR 477, wherein it has been observed by this Court in paras 4 and 6 as under.:

"4. The language of the statute is unambiguous and clear in its terms. Before the person can be said to have incurred disqualification under the aforesaid provision, it must be shown that the Councillor had share or interest in any work done by the order of the Municipality or in any contract or employment with or under or by or on behalf of a Municipality. It is not that the disqualification referred to above occurs as soon as the family relationship is shown to exist between the Councillor and the person who has done any work by order of the Municipality or obtained any contract from Municipality or obtained employment under it. The necessary ingredient is that it must be shown that Councillor has a share or interest in such work, contract or employment and that in obtaining such work, contract or employment, such person has acted as Councillor. The finding must show nexus between such share or interest of the Councillor, the direct or indirect, by himself or through partner, in any work done by the order of the Municipality or in any contract or employment obtained with or under or by or on behalf of the Municipality, and any act on the part of Councillor in securing such work, contract or employment furthering that share of interest. The provision cannot be read to mean that merely on establishing a relation by blood, marriage or otherwise between the person who has been elected as Councillor and the person who has obtained any contract from Municipality would render the Councillor disqualified to hold the office ipso facto. Councillor's action as such in securing such contract, work or employment is sine qua non before he incurs disqualification.

6. From the aforesaid, it is apparent that the Collector has not even applied his mind whether the Councillor had any interest of any nature in the contract of supply of cement and metal obtained by Dharmendra Narmadashankar Joshi. It has rest contended to observe that because of the relationship which exists between the petitioner and the contractor, the interest

> in each other does not cease merely because the name of Dharmendra N.Joshi has been deleted from the ration card of the petitioner. One wonders how the interest which one can have with the relation can further be presumed that one has share or interest in other's commercial or business activity which a man would ordinarily undertake to further his career. In pursuing such activity relationship with Councillor is no disqualification nor any disqualification is incurred by the Councillor to continue to hold office merely because any of her relatives in normal pursuit of his business deals with the Municipality. The Councillor must not have actively or indirectly participated to secure any benefit which ultimately reaches her. It is immaterial whether such interest has been accrued in the name of Councillor or in somebody else's name. It is the furtherance of economic interest that renders the Councillor disqualified and not the existence of the family or personal relations between the two. The order does not disclose existence of such interest in the contract of supply of cement etc., obtained by said Dharmendra N.Joshi from the Municipality. There is not a whisper in the order that the petitioner acted as a Councilor to secure such work or contract from Municipality in favour of said Dharmendra. It is rather undisputed fact that the Councillor was nowhere connected with the Construction Committee which was responsible for the work in question and for grant of contract. That rules out the question of direct interest or share in the contract and participation of Councillor in decision making. There is not even suggestion that the petitioner had any indirect interest in the contract given to said Dharmendra Narmadashankar Joshi by the Municipality."

##. Ms.Vyas, learned AGP, submitted that since the Director of Municipalities has not considered certain judgments of the Apex Court as well as of this Court, the matter may be sent back for reconsideration. However, in my view, when there is no legal and rational evidence available on record for initiation of proceedings under Section 38 of the Act against the petitioner, it is not necessary to remand the matter for reconsideration. Considering the facts of the case, it can never be said that the petitioner has misused her position as councillor. It is also required to be noted that, even the President, who was signatory to the promotion order,

has not been removed under Section 38 of the Act, though, of course, the Court is informed that the proceedings have been initiated, but till today, no final order is passed against the said President. As against that, the petitioner has already been removed. In my view, the petitioner has not incurred any disqualification as contemplated by Section 38 of the Act. However, it is clarified that, this Court has not examined the merits of the promotion order, as, the said aspect is beyond the scope of the present petition. It is required to be noted that the petitioner was neither the appointing authority nor the authority, who can issue any promotion order. As an elected representative, it was open for the petitioner to decide, whether to participate in a particular meeting at the relevant day, but simply by not remaining present in the meeting, one cannot jump to the conclusion that, in order to get promotion order in favour of her son, she remained absent from the meeting at the relevant day. It cannot be said that, with a definite object of getting some benefit, she has not remained present. The order in question is passed in a very routine, casual and mechanical manner. The said order, therefore, deserves to be quashed and set aside.

##. In view of what is stated above, the petition deserves to be allowed and, accordingly, the same is allowed. The impugned orders at Annexures- A and B are quashed and set aside. The petitioner shall be entitled to continue to function as councillor and her status as councillor is restored by setting aside the impugned orders. Rule is made absolute accordingly with no order as to costs.

(P.B.Majmudar,J)
(pathan)